

Oeun (Migration) [2023] AATA 2791 (5 July 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Daro Oeun
REPRESENTATIVE:	Mr Rex Howard (MARN: 9251016)
CASE NUMBER:	1912845
HOME AFFAIRS REFERENCE(S):	BCC2014/3361253 OSF2014/051135
MEMBER:	Edward Howard
DATE:	5 July 2023
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa: • cl 801.221(2) of Schedule 2 to the Regulations

Statement made on 05 July 2023 at 12:47pm

CATCHWORDS

MIGRATION – Partner (Residence) (Class BS) visa – Subclass 801 (Spouse)– parties are validly married – extensive evidence of their financial relationship – parties are in a genuine and continuing relationship – a genuine spousal relationship — decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65

Migration Regulations 1994, r 1.15, Schedule 2, cl 801.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 14 May 2019 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant applied for the visa on 4 December 2014 on the basis of his relationship with his sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl 801.221.
4. The applicant appeared before the Tribunal on 4 July 2023 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. The applicant was represented in relation to the review.
5. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

6. ISSUES AND LAW

7. There is a two-stage process for offshore Partner visas. A visa applicant must first hold a provisional visa, enabling them to remain in Australia on a temporary basis, prior to the grant of a permanent visa. The grant of a permanent visa would generally depend on whether the relationship has continued for a period of at least two years. In this matter, the Tribunal is considering the second, permanent stage.
8. Where the Tribunal is considering a criterion that requires the definition of spouse or de facto partner to be met at the time of the visa application, the information supplied in relation to the reg 1.15A(3) matters may relate to circumstances after the time of application. In forming a view of the relationship at the time of application, the Tribunal must consider all relevant evidence, which may include evidence of events after the date of application insofar as it assists in the task of determining whether the visa applicant and the review applicant were in a partner relationship at the time of the application. Evidence of events after the visa application is relevant if it tends logically to show the existence or non-existence of facts relevant to the issue to be determined.¹
9. Relevantly to this matter, cl 801.221(2)(c) requires that at the time of this decision, the applicant is the spouse or de facto partner of the sponsoring partner, who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen and was identified in the related Subclass 820 visa application.

¹*Ally v MIAC* [2008] FCAFC 49 at [32]–[35]; *Jayasinghe v MIMA* [2006] FCA 1700 at [35], citing *MIEA v Poche* (1980) 4 ALD 139 at [24] per Deane J which held that evidence of subsequent events may be taken into account if it ‘tends to logically show the existence or non-existence of’ the relationship at that particular time; and see also *Bretag v IRT* [1991] FCA 582 at [13]–[15].

On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.

Are the parties validly married?

10. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

Financial aspects of the relationship – including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses.

11. The parties have provided extensive evidence of their financial relationship. This includes their joint bank account with the Commonwealth Bank. The weekly salaries of each of the parties is deposited into this account and they pay their regular household expenses including rent, mortgage payments, utilities and other expenses from this account.
12. From the time of their marriage in November 2014, the parties lived with the sponsor's mother and step-father and other family members at two different residences, which were owned by sponsor's parents. Whilst they did not pay regular board or rent during this period, they contributed financially to regular costs including the purchase of food and other items.
13. The visa applicant currently works for Noja Power in Brisbane in packaging and testing of electrical switches. He works on a full-time basis, Monday to Friday and earns approximately \$860 net per week. Prior to this job, he worked in a packaging and distribution company, held a fly-in-fly-out role for a resource industry job in Darwin and at a Brisbane meatworks factory.
14. The sponsor is in the property management industry. She has worked in that industry since approximately 2016 and has attained certificates and registration working on an in-house and off-site basis. She is currently employed by Spire Realty, where she has been for approximately two years. The sponsor earns \$935 net per week.
15. In March 2022 the parties purchased their own home at Waterford West in Queensland and lived there continuously until about April 2023. Following several interest rate rises, the parties found it too difficult to maintain the mortgage payments and decided to rent their property and move back into the home of the sponsor's parents. Their plan is to continue to rent their own home until interest rates decrease and they have saved further funds to enable them to move back into their own residence.
16. The parties own the Waterford West property jointly and are jointly liable and responsible for the mortgage to the Commonwealth Bank over the property.
17. The Tribunal is satisfied that the parties have joint ownership of a major asset, namely their home at Waterford West; have incurred significant joint liabilities in relation to the mortgage over their residence; have pooled their financial resources; and have shared everyday expenses. The Tribunal is satisfied that the financial arrangements are consistent with the financial situation of a committed and genuine relationship.
18. The Tribunal weighs the financial aspects of the relationship in favour of the visa applicant.

19. *Nature of the household – including any joint responsibility for care and support of children; parties' living arrangements; and any sharing of housework.*

20. The evidence of the parties is that they lived with the sponsor's parents from the time of their marriage in November 2014 until March 2022 when they purchased their own home. They remained in their own home until April 2023 when they moved back to live with the sponsor's parents again as they found the repayments on their mortgage too expensive as a result of interest rate rises.
21. The evidence of the parties is that whilst they have lived with the sponsor's parents, they have each contributed to the normal household chores and work, especially with regards to laundry and cleaning. The sponsor's mother does most of the cooking in the house and the sponsor's stepfather is responsible for mowing the lawn and yard maintenance.
22. Whilst they were living alone as a couple, the parties shared all of the normal household duties including cooking, cleaning and laundry and the visa applicant undertook yard care.
23. The Tribunal is satisfied that the parties household and living arrangements are consistent with that of a married couple in a genuine relationship. The Tribunal weighs the household aspects in favour of the visa applicant.

Social aspects of the relationship – including whether parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.

24. The parties have provided extensive evidence supporting their claim of being in a genuine relationship. The evidence demonstrates the clear recognition by family, friends and acquaintances, recognising the parties as a genuine couple over a period of more than 8 years.
25. The evidence of the parties is that they socialise with family and friends on a regular basis. This evidence supports the claim that they represent themselves to other people as being in a committed spousal relationship.
26. At the Hearing of this matter, the Tribunal heard evidence from several friends and family members who each gave evidence as to the genuine nature of the relationship between the parties. In particular, the Tribunal heard from Ms Morgan Howard, Mr Colin Jerram and Ms Agnes Nicole. Ms Howard and Ms Nicole are friends of the parties and have regular contact with them. Mr Jerram is related to the sponsor by marriage.
27. Each of the witnesses gave evidence of their own observations of the visa applicant and sponsor as a couple. They each described a loving and genuine relationship between the parties. Each of these people impressed the Tribunal as a helpful, credible and truthful witnesses.
28. The Tribunal weighs the social aspects of the relationship in favour of the visa applicant.

Nature of persons' commitment to each other – including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.

29. The parties first met in 2013 and were married in November 2014. They lived with the sponsor's parents from the time of their marriage until March 2022, when they purchased their own home. Unfortunately, as a result of rises interest rates, they were forced to move back to the sponsor's parent's home. They have now rented their own home and hope to return there in the near future when they are financially able.

30. The visa applicant currently works for Noja Power in Brisbane in packaging and testing of electrical switches. He works on a full-time basis, Monday to Friday and earns approximately \$860 net per week. Prior to this job, he worked for a packaging and distribution company, held a fly-in-fly-out role for a resource industry job in Darwin and at a Brisbane meatworks factory.
31. The sponsor is in the property management industry. She has worked in that industry since approximately 2016 and has attained certificates and registration working on an in-house and off-site basis. She is currently employed by Spire Realty, where she has been for approximately two years. The sponsor earns \$935 net per week. Between 2016 and 2018, the sponsor worked for a property management business at Wynnum West in Brisbane.
32. In January 2019, the Department received an email purporting to be from the sponsor and stating that she wished to withdraw her sponsorship of her husband. The allegation referred, amongst other things, to the sponsor having a relationship with another person and to her mother having arranged the marriage with the visa applicant.
33. The email and its contents were put to the sponsor and visa applicant during the Hearing of this matter. The sponsor gave evidence that her email and work mobile phone had been used by her former employer to send the email to the department. The phone number that was required to change the password on her email account was a work mobile phone, which was in the possession of her employer at the relevant time. It had been given to him as the sponsor and her husband were in Cambodia visiting family.
34. The evidence of the parties is that the former employer had harassed and troubled the sponsor over a period of time, seeking to have a relationship with her and trying to convince her to leave her husband. The sponsor rejected the behaviour of the former employer. The email was sent to the department from her email account after the former employer had confronted the sponsor and visa applicant at the residence and demanded that she returned to work for him. As a result of this encounter, the sponsor quit her job and left the employment immediately.
35. The former employer persisted in harassing the sponsor. On one occasion he attended the home of her parents whilst the parties were living there and the police were called, although he left before they arrived. On another occasion, he falsely informed the police that the sponsor was his girlfriend and that he was concerned as she was missing. The police contacted her mother who informed the police that this was false. As a result of these matters, the sponsor and her husband attended the local police station and filed a complaint. They are unaware as to what transpired further with the former employer, however they never heard from this person again.
36. The allegations raised were unverified and uncorroborated. The Tribunal was impressed by the visa applicant and sponsor as honest, credible and forthright witnesses who gave truthful evidence in relation to these matters. The Tribunal gives no weight whatsoever to the allegations raised.
37. From the evidence provided, the Tribunal accepts that the parties have supported and cared for each other through difficult times, especially relating to the harassment suffered by the sponsor from her former employer. The evidence supports a finding that the parties are in a genuine and continuing relationship, showing strong commitment to each other and clearly see the relationship as long-term. The Tribunal weighs the nature of the commitment in favour of the visa applicant.

38.

39. Given these findings the Tribunal is satisfied that the requirements of s 5F(2) are met at the time of this decision. Further, the Tribunal is satisfied that the applicant meets cl 801.221(2).
40. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 801 visa.

DECISION

41. The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:
 - cl 801.221(2) of Schedule 2 to the Regulations

Edward Howard
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).